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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 781

VIRGIL C. MOORE,

Petitioner,

v.

MARIE E. MATHIS AND
J. E. (BILL) DECKER,
Sheriff of Dallas County, Texas,

Respondents.

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, Eastland, Texas

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Virgil C. Moore, hereinafter called petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas entered in the above case on June 28, 1963.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas (infra, Appendix pp. 24-35) is reported at 369 S.W. 2d 450.

JURISDICTION

The judgment of the Court of Civil Appeals was dated and entered on June 28, 1963 (R. p. 353) and petitioner's timely filed Motion for Rehearing was denied by that court

July 19, 1963 (R. p. 353). Petitioner's Application for Writ of Error to the Supreme Court of Texas was : Refused. No reversible error. October 2, 1963 (R. p. 409) and petitioner's timely filed Motion for Rehearing was overruled by the Supreme Court of Texas on October 30, 1963 (R. p. 409). The judgment and each order mentioned above are shown in the Appendix, infra, pp. 35-36.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257 (3) since petitioner claims he has been denied by the State of Texas the right to due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether a default judgment rendered by a state court violates the guarantee of due process of law accorded by the Fourteenth Amendment where the methods of proceeding actually adopted by the judge so far depart the course of procedure established by the applicable Rules of Civil Procedure as to negative any reasonable probability that the judge was attempting to implement such established procedure.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States and the rules involved are Rules 41, 220, 240, 243 and 301 of the Texas Rules of Civil Procedure. They are printed in the Appendix, infra pp. 37-39.

STATEMENT OF THE CASE

How Federal Question Is Presented

Petitioner Moore, as plaintiff in the trial court in the present cause, sued for a permanent injunction seeking to enjoin permanently the execution of a default judgment rendered by the same court, to-wit: the 14th Judicial Court of Dallas County, Texas, in another and different cause, to-wit: Cause No. 41754-2-A, styled *Marie E. Mathis v. Virgil C. Moore.* (R. pp. 26-38) The grounds upon which the injunction was sought included, inter alia, the proposition presented by this petition: that the default judgment had been rendered in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the trial court below, petitioner pleaded that the default judgment in question had been rendered against him ". . . in violation of the due process clause * * * of the Constitution of the United States * * *" (R. pp. 36-37) The evidence upon the due process question consisted of the pleadings, the official reporter's Statement of Facts, the judgment, the Judge's Docket sheets and other items comprising the official record of the questioned proceedings. (R. pp. 92-241) All of same were offered and admitted into evidence upon the trial of the injunction proceeding. (R. p. 55) The injunction was denied. (R. p. 41) The same proposition was presented to the Court of Civil Appeals by Second Point of the Brief of Appellant. (R. p. 287) and by Points 1, 2 and 3 of Appellant's Motion for Rehearing. (R. p. 349) The same proposition was also presented to the Supreme Court of Texas by the petitioner's Application for Writ of Error (R. p. 363) and Motion for

Rehearing (R. p. 404). Both appellate courts denied relief (R. pp. 353 and 409). The judgment sought to be reviewed by this petition for Writ of Certiorari is that of the Court of Civil Appeals since the Supreme Court of Texas did not exercise the jurisdiction it possessed and instead simply refused petitioner's Application for Writ of Error and Motion for Rehearing in connection therewith (R. p. 409).

Other Facts

It is undisputed that in the position that petitioner Moore stood in still another cause in the same trial court, to-wit: Cause No. 41754-A, styled *Marie E. Mathis v. Signature Loans, Inc., et al,* he was subject to the rendition of an interlocutory order of default against him at the time the questioned proceedings took place. But such would not have constituted a final judgment and he would have been entitled to a jury trial of the question of damages. The trial judge undertook to convert the situation into one where a final judgment could be rendered by incorporating into the form of judgment actually signed a recitation to the effect that Marie E. Mathis' cause as against Petitioner Moore was severed, given a new cause number, 41754-2-A, and a new style, *Marie E. Mathis v. Virgil C. Moore.* (R. p. 139). (The form of the judgment in question is fully shown within the opinion of the Court of Civil Appeals. See Appendix p. 27, infra.

Petitioner's proposition is that the purported severance was purely a sham and an arbitrary and capricious contrivance to evade the effect of the applicable Rules of Civil Procedure, to deny petitioner a jury trial on the damage

issue and to render a final instead of an interlocutory default judgment against him; and that in pursuing such a course of action the district judge denied the petitioner the due process of the law guaranteed by the Fourteenth Amendment.

Simply stated, what occurred was this: Respondent Mathis' attorney discovered that this petitioner, being one of several defendants in the original cause in question, had failed to timely file an answer. He brought the default to the attention of the court (R. p. 195) and proceedings were had in the cause to establish the occurrence of the default and to predicate the entry of a decree. (R. pp. 195-215) The cause then being (and thereafter at all times remaining) on the jury docket (R. p. 238) and the cause of action being unliquidated, (R. p. 132) the respondent was entitled, under the circumstances that existed at that point, to the entry in her favor of an interlocutory judgment of default, and the award of a writ of inquiry for trial of the issue of damages to a jury. Texas Rules of Civil Procedure:

> "Rule 240. Where Only Some Answer.
>
> Where there are several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default, an interlocutory judgment by default may be entered against those who have made default, and the cause may proceed or be postponed as to the others."
>
> "Rule 243. Unliquidated Demands.
>
> If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default

shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket."

The cause was on the jury docket at the plaintiff's demand and payment of the fee. (R. p. 238) "Where one party demands a jury and pays the fee, the right thus secured by him inures to all the other parties to the suit." *Finnell v. Byrne* (CCA, San Antonio—1928) 7 S.W. 2d 139, *Highsmith v. Tyler State Bank & Trust Co.*, (CCA, Texarkana-1946) 194 S.W. 2d 142, err. ref.

But respondent's attorney was not satisfied with what the law allowed. He was effectively prevented from withdrawing the cause from the jury docket by Rule 220, T.R.C.P., and made no effort to do so:

"Rule 220. Withdrawing Cause from Jury Docket.

When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit."

Nonetheless, he prevailed upon the judge to try the damage issue sitting without a jury (R. p. 194) and to enter a purportedly final judgment. (R. p. 139)

All these proceedings were had in one and the same cause. (R. pp. 194-215) But when the judgment was entered, it recited a severance as to this petitioner, the creation of a separate cause as to him and the award of a final judgment in such severed cause. (R. p. 139)

Rule 41, T.R.C.P., provides that:

"* * * actions which have been improperly joined may be severed and each ground of recovery improperly

> joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately."

But it is apparent upon the face of the record herein under consideration, that there was no claim of improper joinder and that the stage of the action at which the severance was attempted was *after* and *not before* the time of submission to the jury or to the court.

The last sentence of the fourth paragraph of the opinion of the Court of Civil Appeals reads:

> "On June 23, 1961, the court severed plaintiff's cause of action against Moore from that against all other defendants, tried the severed cause, giving it number 41754-2-A and styling it Marie E. Mathis v. Virgil C. Moore, and rendered judgment for Mathis against Moore." (infra, Appendix p. 25).

The implication that the trial court tried the severed cause *after* the severance is incorrect and contradicts the true facts as shown by the face of the record.

Reasons for Granting The Writ

This case raises the due process question in a context completely removed from the volatile area of race relations; yet it presents squarely the question of whether the due process clause places a practical and effective curb upon official lawlessness: a question of great significance in race relations problems as well as uncounted others. If there is no practical and effective means for distinguishing between arbitrary and capricious action on the one hand and "mere

error" on the other, then there it no real hope of confining official action (either judicial or executive) to the Rule of Law. It is the thesis of this petition that there is a practical and effective distinction between arbitrary and capricious action and "mere error"; and that this case provides a clear and readily articulated illustration of that distinction. A Writ of Certiorari should issue in this cause in order that the court may examine and expound the distinction urged. The exposition and enforcement of the distinction by this Court will bring the Rule of Law a long step closer to reality.

Petitioner says that the procedure adopted and applied by the trial court in the questioned proceedings was purely ad hoc and completely departed any reasonable concept of legal proceedings "according to those rules and principles which have been established" by the Texas Rules of Civil Procedure. He grounds the present collateral attack on the judgment in question upon the principles stated in *Pennoyer v. Neff*, 95 US 714, 24 L. Ed. 565:

> "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established

> in our systems of jurisprudence for the protection and enforcement of private rights."

In *Pennoyer v. Neff*, the procedure under consideration was one for providing notice to non-resident parties and the question involved was as to the efficacy of such procedure to give the court power to make an in personam judgment against the non-resident. In this case different procedures are under consideration and the question of the court's power in connection therewith does not involve the concept of territorial limitation which inhered in the facts of *Pennoyer v. Neff*. Nonetheless, the basic question is the same. As pointed out in the above quotation the question of what constitutes due process of law embraces every permissible exertion of power affecting private rights. The question here, therefore, is whether the powers exerted by the court in this case fall within or without the concept of due process.

The identity of purpose which inheres in all procedural rules regardless of whether same relate to the subjects of notice and hearing or to other subjects has been most ably stated in *Bennett v. Jackson* (CCA - Texas - Waco, 1943) 172 S.W. 2d 395, 397, err. ref. w.m.:

> "The ultimate purpose of all rules of procedure is to secure to every litigant a fair and impartial adjudication of his rights under established principles of substantive law to the end that justice may be done. Rule 1 of Texas Rules of Civil Procedure. In order to accomplish this objective, certain qualifications, prerogatives and responsibilities are definitely required of, vested in and placed upon the trial judge, jury, witnesses, and each participant in all the courts. *Reasonable adherence to the established rules* by each and all, consistent with a proper exercise of sound judicial discretion, *is indis-*

pensable to the administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration." (Emphasis supplied).

Petitioner recognizes that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law; and that in order to constitute a denial of due process it must be shown that the judgment amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," *American Ry. Express Company v. Commonwealth of Kentucky*, 273 US 269, 47 S. Ct. 353, 71 Law. Ed. 639.

Petitioner says that in the instance here under consideration it is clear that the court's action departed the bounds of any reasonable interpretation of the applicable rules. Instead the action taken manifests an active indifference to the established procedures. If it be assumed that the judge was informed as to the contents of the respective rules, then it must also be assumed that the action was taken with conscious disregard of the rules.

The line that must be drawn in deciding whether judicial action goes beyond mere error and operates as a denial of due process is the line between acts which have some reasonable probability of serving a purpose sought to be implemented by the rule or method of law in question and acts which have no reasonable probability of serving a purpose sought to be implemented by that method of law.

If the action which the trial judge took in the instance under consideration, when observed, considered and judged from the standpoint of an objective observer, had some reasonable probability (though slight) of serving one or more of the purposes for which severances are authorized under Rule 41, then a denial of due process did not occur. If, on the other hand, when objectively observed, considered and judged, it be found that the action taken had no reasonable probability of serving one or another of the purposes for which Rule 41 authorizes a severance, then a denial of due process of law did occur. Stated another way: if it be found, when the action taken is objectively observed, considered and judged, that it was highly improbable that the action taken would serve any of the purposes for which Rule 41 authorizes a severance, then a denial of due process has occurred.

It is highly improbable that the severance here in question would serve to remedy a misjoinder. No misjoinder was claimed nor did one exist. It is highly improbable that the claim against Virgil C. Moore was severed in order that it might be "proceeded with separately," because the claim against Virgil C. Moore had to be proceeded with in the main cause where the default occurred, if advantage was to be taken thereof; and the record shows without question or doubt that the claim against Virgil C. Moore *was proceeded with in the main cause and not proceeded with separately* in the severed cause. The only purpose or end which the severance had any reasonable probability of serving was the purpose or end of granting a separate final judgment against Virgil C. Moore. This is not a purpose

or end authorized by Rule 41, T.R.C.P.; nor is it a purpose or end authorized by any other of the Texas Rules of Civil Procedure. It is not a "permissible exertion of power"; but an "arbitrary and capricious exertion of power" in clear conflict with "established rules and principles." It is not an "administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration." Instead, it is precisely the latter—justice according to the personal opinion of the individual occupying a judicial position. In like manner when objectively observed, considered and judged, the action of the judge in hearing evidence and rendering a verdict on the damage issue without a jury cannot be said to have had any reasonable probability of serving the objective of securing a jury's verdict on that issue Yet, under the circumstances then existing, Rule 243 called for the award of a writ of inquiry and trial to a jury. The rule was utterly disregarded. It was not an administration of justice according to law but an exertion of power according to the personal inclination of the judge: a purely arbitrary and capricious exercise of power.

It is true, of course, that in order that decisions may be made at all, a judge must be allowed both an area for the exercise of sound discretion and a margin for error. And, where there is some reasonable probability that the action taken would serve some end sought to be implemented by the method of law in question, there is no denial of due process even though the decision be erroneous. It is only when the action taken departs the bounds of reasonable probabilities that a denial of due process of law occurs.

At first blush it may be thought that the necessary distinction is too subtle to be practical; but this is not so. As Justice Holmes has pointed out: "even a dog distinguishes between being stumbled over and being kicked." Holmes, *The Common Law*, Little, Brown and Company, 1938, p. 3; and this is quite a subtle though entirely practical distinction.

Moreover, the distinction has been applied in many cases and has demonstrated itself to be thoroughly practicable. Not only has it been applied to test the validity of acts purporting to have been done in the implementation of an established method of law; but it has also been applied to test the validity of legislative enactments purporting to establish a method of law.

In *McFarland v. American Sugar Refining Company*, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (opinion by Justice Holmes) the Court held a presumption created by the Louisiana Legislature to be a violation of the equal protection clause of the 14th Amendment because there was no reasonably probable connection between facts raising the presumption and the fact to be presumed:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 55 L. Ed. 78, 80, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N.C.C.A. 243. The presumption created here has no relation in experience to the general facts."

In *Tot v. United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 504 the Court had under consideration:

> "* * * the question of the power of Congress to create the presumption which §2 (f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute.
>
> "The Government argues that the presumption created by the statute meets the tests of due process heretofore laid down by this court. The defendants assert that it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant. 319 U.S. 466, 63 S. Ct. 1244.
>
> * * * * * *
>
> "[4,5] The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendmants set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits. 319 U.S. 467, 63 S. Ct. 1244."

The Court held:

> "[12] Whether the statute in question be treated as expressing the normal balance of probability, or as lay-

> ing down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision. 319 U.S. 469, 63 S. Ct. 1246."

Thus, we find that even legislative bodies, in the exercise of the broad discretion necessarily vested in them as a part of their power to legislate, are nonetheless confined to the bounds of reasonable relationships. The creation of purely arbitrary presumptions is permitted neither to the federal nor to state legislatures; but is prohibited by the due process clauses of the Fifth and the Fourteenth Amendments:

Similarly, legislative bodies after having adopted a set of rules are not free to ignore them but are bound to observe their own rules and have no power to act except in accordance with their rules.

In *United States v. Smith*, 286 U.S. 6, S. Ct. 475, 76 L. Ed. 954, the United States Senate had voted to confirm the appointment of George Otis Smith to the Federal Power Commission and after appropriate notification, commissioning and swearing-in, Smith took office. Upon the very next session-day following his assumption of office the Senate voted to reconsider and wihtdraw its consent. When the controversy reached this Court, it held that under those circumstances and the Senate's then existing rules, the Senate's "power to reconsider was gone." The Court pointed out that the question was not the constitutionality of the rules but the proper construction to be given them.

The rules themselves withheld from the Senate the "power to reconsider."

In *the United States v. Ballin*, 144 U.S. 1, 12 S. Ct. 507, 36 L. Ed. 321, the rules of the House of Reprensentatives were under consideration and the Court commented thusly with regard thereto:

> "The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." 12 S. Ct. 509.

At a subsequent point the opinion the Court focuses attention upon the very heart of the reason why the *power* of the houses of congress to act is dependent upon their rules:

> "The two houses of congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole; and the question which has, over and over again, been raised is, what is neces-

sary to constitute the official action of this legislative and representative body?" 12 S. Ct. 509.

It is easy to see that where a court is comprised of several members, its power to act is dependent upon its rules in a way closely analogous to the situation of the legislative body. It is not quite so easy to see, but nonetheless true that the power of a one-judge court to act is fully as dependent upon its rules. A court is not just a man. A court does not come into existence upon the bank of a creek when a judge sits down with a fishing pole, or a favorite book. Even a one-judge court is comprised of several persons each and all of whom occupy an official status of one kind or another and perform official functions as a part of the court. The functioning of all official personages of the court and of all official elements of the court are essential to the performance of judicial acts as distinguished from mere personal acts. A judicial act is the act of a composite group of functionaries and elements and not merely the act of an individual. Since a composite group cannot function except in accordance with some established pattern, it will be seen that rules establishing such a pattern are the very source of its power to act — and not mere limitations upon a power that is derived from another source.

As a matter of fact, all persons functioning in official capacities in our society are in essentially the same position as a judge. They must function as officials and not mere personages. If they or their superiors in authority promulgate rules of office, then the *office* functions according to those rules; and acts which depart the scope of the rules

are acts of the *person* involved and not the acts of the office.

In *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed 2d 1012, Vitarelli had been dismissed from his post in the Department of Interior.

The Court held:

> "Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect." 359 U.S. 544, 79 S. Ct. 975.

Even the minority of the court which dissented as to another aspect of the case agreed with the above holding and said:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. See Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80, 87-88, 63 S. Ct. 454, 459, 87 L. Ed. 626. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed." 359 U.S. 546, 79 S. Ct. 976.

Prior to the Vitarelli decision, a similar holding with respect to the Department of Justice had been made in *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct 499, 98 L. Ed. 681; and another had been made with respect to the Secretary of State in *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403.

In *Yellin v. United States*, U.S. , 83 S. Ct. 1828, 10 L. Ed. 2d 778, decided June 17, 1963, the Court held that the House Committee on Unamerican Activities was likewise bound to the observance of its rules.

When such official bodies and personages as these are held to be bound to observe their rules, how can there be any justification for permitting a person occupying a state judicial office to act with manifest indifference to and conscious disregard of the rules of that office? Obviously, there can be no justification for it; and if our people are to be a people that live under the rule of law rather than the rule of man, all official personages must be bound to an observance of the rules of their offices: bound to act in accordance with the due course of the law of the land: bound to accord to all persons due process of law. Petitioner says that a practical and workable test for so binding official actions is provided by the test applied in the above decisions, that is: by ascertaining whether a reasonable relationship exists between the act in question and the objective of the particular rule or method of law involved.

The requirement that both the methods of law themselves and the means adopted for implementing same must bear

a reasonable relationship to the objective sought to be attained is derived from the fact that all systems of law are premised upon the theory of cause and effect. The theory of cause and effect is immanent within every system and method of law because the actual experience and understanding of cause and effect is the common denominator for all human behavior. It is the source of all systems of discipline. Every man knows that if he causes a rock to be thrown at his neighbor's window, the effect will be a broken window. Every man also has the capacity to judge whether one mode of proceeding produces a greater or less probability of the occurrence of a particular effect. If a man aims a rock at his neighbor's window, there is a greater probality of the effect of a broken window than if the rock is simply carelessly handled.

By the same common understanding of cause and effect, every man is able to observe and consider any particular act and form a judgment as to the probability of that particular act being related to a particular objective. Burglary convictions are obtained upon a jury's assessment of the probabilities as to the objective sought to be attained by a man observed in the act of breaking into a house and removing articles therefrom. Other explanations for his conduct can be offered; but the jury weighs the probabilities and if they judge the probabilities to be of such degree as to be beyond a reasonable doubt then he is convicted.

The objective sought to be attained by a judge in the performance of any particular act in the course of a judicial proceeding is equally subject to observation, con-

sideration and judgment. If there is no reasonable probability that a particular act will serve the objective of the particular method of law sought to be implemented, then it cannot be said that the due course of that law has been followed or that the due process of that law has been accorded.

Judging the relationships between particular acts on the one hand and particular objectives on the other does not involve a process that is arcane, abstruse or inscrutable. It is eminently practical and practicable and, in fact, necessary to every system of law known to man. It provides a reliable means by which to judge which judicial acts are merely erroneous and which constitute denials of due course of law and due process of law.

Petitioner says that the judicial acts here under consideration clearly departed the realm of reasonable relationship to the objectives of the methods of law ostensibly employed and therefore constitute denials of due process of law.

CONCLUSION

WHEREFORE, the petitioner respectfully prays that the Court issue its Writ of Certiorari to review the judgment of the court below herein.

Respectfully submitted,

FRED S. ABNEY,
1520 Republic National
Bank Building,
Dallas 1, Texas.
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, FRED S. ABNEY, a member of the Bar of the Supreme Court of the United States, do hereby certify that upon the 22nd day of January, 1964, I served copies of the foregoing petition for Writ of Certiorari on the respondents by depositing same in the United States post office or mail box with postage prepaid addressed to the following counsel of record in the courts below at their respective post office addresses, to-wit:

Mr. Edward R. Vinson
Fritz and Vinson
909 Reliance Life Building
505 North Ervay Street
Dallas, Texas

Attorneys for Respondent
Marie E. Mathis

Mr. A. D. Jim Bowie
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Dallas County, Texas
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Attorney for Respondent
J. E. Bill Decker, Sheriff of
Dallas County, Texas

Fred S. Abney

FRED S. ABNEY

OPINION

In the

Court of Civil Appeals

Eleventh Supreme Judicial District of Texas

No. 3816

VIRGIL C. MOORE,

Appellant,

v.

MARIE E. MATHIS *et al,*

Appellees.

Appealed from the 14th District Court of Dallas County.

On October 12, 1962, Virgil C. Moore sued Marie E. Mathis and the Sheriff of Dallas County to enjoin enforcement of a default judgment obtained by Mathis against Moore on June 23, 1961 and for a bill of review. The court refused to try the bill of review on its merits and, after a hearing, denied an injunction. Moore has appealed.

Appellant's first point is that the default judgment was either an interlocutory order in the main case or a void judgment in the severed case and, therefore, the court erred in refusing to enjoin its enforcement. His second point is that the judgment is void because it violates the guarantees of due process of law accorded appellant by the Fourteenth Amendment to the Constitution of the United States and due course of law by Article I, Section 19, of the

United States and due course of law by Article I, Section 19, of the Constitution of Texas. His third point is that the court erred in denying appellant's bill of review without hearing evidence thereon.

In Mathis' trial petition in cause number 41754-A, styled Marie E. Mathis v. Signature Loans, Inc., et al, a copy of which *was served on Moore* on April 30, 1960, she alleged that Moore and other defendants had collected usurious interest from her and had used unreasonable collection efforts causing mental and physical suffering. Although cited, Moore did not answer. On June 16, 1961, Marie Mathis testified at a hearing on the default as to the financial transactions involved and to harassment. On June 23rd, additional evidence was introduced concerning Moore's participation in the collection of usurious interest and unreasonable collection efforts. On June 23, 1961, the court severed plaintiff's cause of action against Moore from that against all other defendants, tried the severed cause, giving it number 41754-2-A and styling it Marie E. Mathis v. Virgil C. Moore, and rendered judgment for Mathis against Moore.

On October 31, 1961, Moore filed a motion to set aside the default judgment on the grounds that (1) it failed to dispose of all parties and issues; (2) the pleading did not state a cause of action against Moore; (3) the judgment did not conform to the pleadings and (4) it purported to grant a severance when only an interlocutory decree was authorized by law. In the alternative, Moore alleged that (5) the severance deprived him of due process and due course of law and that (6) the judgment was void because

there were no pleadings "in the severed cause" upon which a judgment could be based. A hearing was had on this motion on August 31, 1961, and it was then overruled. Moore excepted. On December 21, 1961, Moore and the other defendants in the original case filed, in case number 41754-2-A, a "joint and several, combined and separate", motion to set aside said default judgment against Moore, urging substantially the same grounds as in Moore's motion which had been overruled on August 31, 1961. This motion was overruled on June 20, 1962. The defendants excepted.

On October 12, 1962, Virgil C. Moore filed this suit alleging substantially the same grounds as those contained in said two motions. He prayed that Mathis and the Sheriff be enjoined from enforcing the default judgment. He did not ask that the default judgment be set aside. Ten days later Moore filed an amended petition, alleging substantially the same grounds and seeking only an injunction.

On November 8, 1962, Moore filed the pleading on which this case was tried. He designated it as his second amended original petition "and bill of review." He alleged substantially the same grounds as theretofore but added general allegations of a meritorious defense and diligence. He prayed for an injunction preventing enforcement of an execution and, in the alternative, for a bill of review setting aside the default judgment of June 23, 1961, and that this cause be consolidated and tried with the main case. Appellees denied Moore's allegations and alleged that Moore's petition failed to state a cause of action; that he had failed to allege fraud, accident

or mistake in procuring the default judgment, or diligence on his part in seeking to set it aside. Appellees further alleged that the validity of the default judgment had been adjudicated and that Moore's asserted cause of action was barred by limitation and laches.

In a trial to the court, it was held that, even if Moore had a meritorious defense to the default judgment, Moore had not alleged the essentials of a bill of review. Therefore, without hearing evidence upon Moore's alleged meritorious defense, the court, after hearing evidence, rendered judgment that Moore take nothing.

The default judgment here attacked as void reads as follows:

"No. 41754-A

MARIE MATHIS,

Plaintiff,

v.

SIGNATURE LOANS, INC., *et al.*,

Defendants.

FINAL JUDGEMENT

On the 23rd day of June, 1961, came on to be heard the above entitled and numbered cause wherein Marie E. Mathis is the Plaintiff and Signature Loans, Inc., Signature Indorsement Company, Finance Operating Company, Service Management Company, W. Lee Moore, Jr., Virgil C. Moore, Mid-Southern Service Company, Federal Mortgage Credit Company, Houston-American Finance Corporation and Houston-American Life Insurance Company, are Defendants, and came the Plaintiff and his attorney and announced ready for trial but came not Defendant, Virgil C. Moore, and the Court having found that the said Defendant, Virgil C. Moore was duly served with

citation herein but failed to enter any appearance in this cause but wholly defaulted, and that Plaintiff's cause of action as to said defaulting Defendant should be severed for convenience of trial and for other reasons from Plaintiff's causes of action against the other Defendant; and the Court having found that Plaintiff's cause of action as to usury double damages is liquidated, but that Plaintiff's cause of action for actual damages for unreasonable collection contracts and for exemplary damages is unliquidated, and the Court having heard the evidence on the liquidated damages, and having heard the pleadings and arguments of counsel for Plaintiff, and such additional considerations and findings as were authorized by law having been had and made, and the Court being of the opinion that judgment should be rendered against said defaulting Defendant, as follows:

IT IS THERFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action against Virgil C. Moore is hereby severed completely from all other causes of action herein, and shall hereafter be a separate cause entitled No. 41754-2-A, styled Marie E. Mathis v. Virgil C. Moore, whereas Plaintiff's causes of action against all other Defendants shall be a separate cause, number 41754-A, styled Marie E. Mathis v. Signature Loans, Inc., et al;

IT IS FURTHER ORDERED that the motion of Plaintiff for judgment against Defendant, Virgil C. Moore, in No. 41754-2-A is granted, and that Plaintiff, Marie E. Mathis, do have and recover from Defendant, Virgil C. Moore, the sum of $271.20 usury double damages, the sum of $2500.00, actual damages, and the sum of $2000.00 exemplary damages, with interest on all said sums at the rate of 6% per annum from the date of this judgment, and that the said Defendant, Virgil C. Moore shall pay one fourth of the costs of court in Cause No. 41754-A accrued up to the time of this judgment.

and an additional sum, comprising all costs in this Cause No. 41754-2-A accrued or to accrue at any time.

As indicated by the above severance, this judgment is without prejudice to Plaintiff's causes of action against all other persons, companies and corporations against whom no recovery is herein awarded.

All relief not specifically allowed against the Defendant in this severed cause which is not otherwise disposed of herein is hereby denied, and this judgment is final as to this severed cause, No. 41754-2-A.

Let execution issue on this judgment.

SIGNED this 23 day of June, 1961.

SARAH T. HUGHES,
JUDGE."

Appellant says this judgment is interlocutory, notwithstanding its recitals to the contrary, because Texas R. C. P. 240 only authorizes an interlocutory order, and further, that it fails to dispose of all issues and all parties as required by Texas R. C. P. 301. He argues that under Rule 301 the judgment cannot be final because it fails to dispose of all parties; that the judgment had to be rendered in case number 41754-A, because that was the case wherein the default occurred; that there is nothing in the record to justify a default judgment in case number 41754-2-A, and that there was no final judgment in number 41754-A because many parties and issues remain undisposed of in that case.

Appellant further contends that assuming a severance was accomplished, nevertheless, the default judgment in the severed case is void because it does not conform to the

nature of the case pleaded, as required by Rule 301. He says that orders severing causes should direct that they be docketed under new numbers and the court should instruct the clerk to transfer to the new case the original, or copies, of the pleadings. Appellant says there was no order of severance in either case; that there was a failure to transfer any pleadings to the new case; that no evidence was heard in the severed case and, therefore, the judgment is void for lack of pleadings and evidence.

Severance of the cause of action against Moore from that against the remaining defendants was within the power and jurisdiction of the court. Even if such action were erroneous, the judgment was final and appealable. After learning of the judgment appellant had ample time to appeal by writ of error. Contrary to appellant's contention, the judgment disposed of all issues between appellant and appellees, the only parties to the severed cause, and it was a final and, therefore appealable judgment. It was not void. In Pierce v. Reynolds, 329 SW 2d 76, 78, the Supreme Court held that a severance was not void because it divided an entire cause of action into two parts. It held that since the trial court had jurisdiction of the subject matter and parties, regardless of how erroneous the trial court's action in granting the severance may have been, it was within the judicial power of the court to determine that the cause was severable and to sever the same. It held that a judgment which fully adjudicates one of the severed causes is appealable, even though the entire controversy as it existed prior to the severance is not determined thereby. The court

said that a judgment that possesses the attributes of finality cannot be regarded as interlocutory merely because the court erred in ordering a severance which it had the power to grant. We think the judgment of June 23, 1961, determined the controversy between appellant and Mathis, the only parties to the severed cause number 41754-2-A, and that Moore's legal remedy was a writ of error. The order was for a severance under R.C.P. 41, not for merely a separate trial. "A severance divides the lawsuit into two or more independent causes, each of which terminates in a separate, final and enforceable judgment." Kansas University Endowment Ass'n. v. King, (Sup. Ct.), 350 SW 2d 11, 19. See Permian Mud Service, Inc. v. Sipes, 339 SW 2d 81, 83.

In Danciger v. Smith, 286 SW 633, (Writ Ref.), Smith sued Danciger and Oriental Oil Company. The court severed the case as to the two defendants, docketed them separately and rendered judgment against Danciger. Danciger contended the court was without power to enter a final judgment because the other defendant was not disposed of. This contention was held to be without merit. In Boone v. Hulsey, (Sup. Ct.), 9 SW 531, it was held that when a severance is granted there may be more than one final judgment. See also Watson v. Watson, 270 SW 2d 298, (Ref. N.R.E.).

It was essential that appellant allege and prove as a basis for a bill of review that he was prevented from timely asserting his defense in the default judgment proceeding by fraud, accident or the wrongful act of the opposing party, unmixed with any fault or negligence of his own. Smith v.

Ferrell, (Com.), 44 SW 2d 962, 963. Appellant's petition for a bill of review did not contain such allegations. It did not show that Moore was prevented from timely asserting his defense by fraud, accident or the wrongful act of Mathis, without fault or negligence on his part. It did not show that he diligently resorted to the legal remedy available to him. The record shows the contrary. The record shows that after appellant learned of the default judgment on August 21, 1951, he waited until November 8, 1962, before seeking a bill of review. For six months after June 23, 1961, appellant had the legal remedy of appeal by writ of error. If the judgment on its face, or as shown by the judgment roll, was void, as appellant contends, his available legal remedy of appeal by writ of error was adequate and effective. In Reynolds v. Volunteer State Life Insurance Company, 80 SW 2d 1087, (Writ Ref.), the Insurance company obtained a default judgment against Reynolds. Reynolds learned thereof within six months but did not seek a writ of error. We held that to entitle a litigant to a bill of review he must allege and prove that he has exhausted all adequate legal remedies available to him. The legal remedy of a writ of error was available to appellant. Therefore, he could not allege or prove that essential of a bill of review. We are forced to the conclusion that appellant did not allege facts essential to a bill of review and that the court did not err in refusing the bill of review without hearing evidence thereon. Southern Surety Company v. Texas Oil Clearing House, (Com.), 281 SW 1045, 1047; Ruland v. Loy, (Com.), 144 SW 2d 883, 884;

Gehret v. Hetkes, (Com.), 36 SW 2d 700, 702; Drake v. First National Bank, 254 SW 2d 230, 232; Garcia v. Ramos, 208 SW 2d 111, 112, (Writ Ref.).

It cannot be said that the record discloses invalidity of the default judgment. Jurisdiction of the person and subject matter appear. If it should be conceded that there was error, nevertheless, the judgment was not void. It was essential that appellant allege and prove facts showing that he was prevented from presenting his defense by the extrinsic fraud of appellee and without negligence on his part. Garlington v. Wasson, 279 SW 2d 668, 669, (Ref. N.R.E.); Elder v. Byrd-Frost, 110 SW 2d 172 and 34 Tex. Jur. 2d 559. Appellant was cited and defaulted. He says the judgment is void on its face. That the fact that it is void is shown by the judgment and pleadings. He had the legal right to appeal by writ of error within six months after June 23, 1961. It was an adequate remedy. He knew of the default judgment before October 31, 1961. On that day his first motion to set it aside was overruled. A second such motion was thereafter overruled. Not until November 8, 1962, did he seek a bill of review. In his second amended petition filed on that date he sought, primarily, an injuction against enforcement of the judgment. In the alternative, he asked that a bill of review be granted setting aside the default judgment and, further, that the case against Moore be consolidated with the main case and that they be tried together. In that pleading Moore alleged the judgment was void because (a) it did not dispose of all parties; (b) the law did not permit a severance of the cause alleged by Mathis; (c) no separate pleadings were filed in the severed cause, etc. Moore did not allege

that he was prevented from presenting such defense by fraud, accident or the wrongful act of appellee, unmixed with any fault or negligence on his own. In Garcia v. Ramos, 208 SW 2d 111, 112 (Writ Ref.), Judge Murray said:

> "Appellants have alleged a good defense to the cause of action, but they have failed to allege facts which show that they were prevented from making such defense, by fraud, accident or the wrongful act of appellees, unmixed with any fault or negligence of their own, as they are required to do before they can secure relief by means of an action in the nature of a bill of review."

The Supreme Court so held in Alexander v. Hagedorn, 226 SW 2d 996, 998. See also Chapa v. Wirth, 343 SW 2d 936. Therefore, the court did not err in refusing to hear evidence as to the alleged meritorious defense. Appellant alleged that he had not been negligent "as reflected by the record." The record shows he was negligent. "Only if a Court has no jurisdictional power to render the judgment should a negligent defendant—be able to relieve himself of the burdens and consequences of a default judgment." McEwen v. Harrison, (Sup. Ct.), 345 SW 2d 706, 711. He was negligent in permitting the default and in not appealing. The record conclusively shows that appellant knew of the judgment against him in time to have prosecuted a writ of error; he contends that the fact that the judgment is void is shown by the judgment and pleadings. He had ample opportunity within the six months allowed by Article 2255 to file an appeal by writ of error. He did not avail himself of this legal remedy. McEwen v. Harrison, supra. Under the decision of our Supreme Court in Wear v. McCallum, 33 SW 2d 723, 724, the pleading was insufficient as a bill of review. The

record certainly did not establish that appellant had a right to enjoin enforcement of the judgment.

Appellant's points have been ably presented but we are forced to the conclusion that reversible error is not shown. They are overruled. The judgment is affirmed.

CLYDE GRISSOM
CHIEF JUSTICE

June 28, 1963.

JUDGMENT

In the

Court of Civil Appeals

Eleventh Supreme Judicial District of Texas

No. 3816

VIRGIL C. MOORE,
v.
MARIE E. MATHIS, *et al.*,

From the 14th District Court of Dallas County.
June 28, 1963

Opinion by Grissom, C. J.

This cause came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Appellant.

Virgil C. Moore, for which let execution issue, and that this decision be certified below for observance.

No. 3816

VIRGIL C. MOORE,
v.
MARIE E. MATHIS, *et al.*,
July 19, 1963

This day came on to be heard Appellant's motion for rehearing and the same, having been duly considered, is hereby overruled.

IN THE SUPREME COURT OF TEXAS

No. A-9802.

October 2, 1963

VIRGIL C. MOORE,
v.
MARIE E. MATHIS, *et al.*

From Dallas County,
Eleventh District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Virgil C. Moore, pay all costs incurred on this application.

No. A-9802.

October 30, 1963

VIRGIL C. MOORE,
v.
MARIE E. MATHIS, *et al.*

From Dallas County,
Eleventh District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

U. S. C. A. Constitution. Amend. 6-14

TEXAS RULES OF CIVIL PROCEDURE

Rule 41. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed

separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately. Amended by order of March 31, 1941. Vernon's Annotated Texas Rules. Rule 41.

Rule 220. Withdrawing Cause from Jury Docket

When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Amended by order of Aug. 18, 1947, effective Dec. 31, 1947. Vernon's Annotated Texas Rules. Rule 220.

Rule 240. Where Only Some Answer

Where there are several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default, an interlocutory judgment by default may be entered against those who have made default, and the cause may proceed or be postponed as to the others. Vernon's Annotated Texas Rules. Rule 240.

Rule 243. Unliquidated Demands

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket. Amended by Order of March 31, 1941. Vernon's Annotated Texas Rules. Rule 243.

Rule 301. Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors. Vernon's Annotated Texas Rules. Rule 301.

Office-Supreme Court, U.S.
FILED
FEB 17 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

No. 781

VIRGIL C. MOORE,
Petitioner,

v.

MARIE E. MATHIS AND J. E. (BILL) DECKER,
SHERIFF OF DALLAS COUNTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD C. FRITZ,
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In the

Supreme Court of the United States

No. 781

VIRGIL C. MOORE,

Petitioner,

v.

MARIE E. MATHIS AND J. E. (BILL) DECKER, SHERIFF OF DALLAS COUNTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OBJECTION TO JURISDICTION

Petitioner never appealed the state court default judgment of June 23, 1961, in Cause No. 41754-2-A (P's Exh. 11, R. 139), nor was this or any petition for writ of certiorari filed to review that judgment. The time for filing a petition in the Supreme Court of the United States to review the default judgment expired long before the instant Petition was filed herein.

The Petition for Writ of Certiorari herein was filed January 23, 1964, to review the state court judgment of November 9, 1962, in Cause No. 72080-A, (R. 41) wherein Petitioner attacked the default judgment in No. 41754-2-A which had

been rendered sixteen months earlier (R. 26-38). After a contested trial (R. 51-77) the state trial court held against Petitioner (R. 41). On Petitioner's appeal the Court of Civil Appeals affirmed, holding that the Petitioner had failed to allege or prove the essentials of an attack on a valid judgment, viz: fraud, accident or wrongful act of the Respondent unmixed with fault or negligence of Petitioner. The Supreme Court of Texas, without comment, refused error, no reversible error (R. 409). That is the extent of the decision below. The decision did not include or involve a ruling as to due process in the trial of either Cause No. 41754-2-A, nor Cause No. 72080-A. Petitioner has never alleged that the court denied due process in the trial of Cause No. 72080-A, the instant cause.

Petitioner did not present to the Texas courts a substantial federal question, and the decisions of those courts did not expressly pass upon or decide a substantial federal question, and not even the Petition herein presents a substantial federal question, at least not one which can override the fact that Petitioner was negligent in failing to preserve it by appealing the earlier default judgment. Petitioner ignores the very points upon which the decision below was based: (1) Petitioner knew of the judgment against him in time to have prosecuted a writ of error. He filed a Motion to Set Aside on August 21, 1961 (R. 151). This was long before the six months for filing a writ of error in the state court expired. Art. 2255, V.A.C.S. (2) He was negligent in not appealing within the six months period allowed.

The decision below stands upon a simple point of long-standing state procedural law, and does not involve even an implied question of due process under the United States Constitution. Furthermore, Petitioner never pleaded in the trial court in the instant cause that he had been wrongfully deprived of a jury (R. 26-38), and even failed to raise the point in the Court of Civil Appeals, below. (R. 281-355) Therefore, that point is not before this Honorable Court.

REPLY TO STATEMENT OF THE CASE

The question of compliance with Texas Rules of Civil Procedure in granting the default judgment in Cause No. 41754-2-A is not before the Court because Petitioner failed to exercise diligence by failing to appeal from that judgment after timely notice. (See Objection to Jurisdiction, supra).

Regardless, neither of Petitioner's objections to the procedure is sound. Petitioner admits jurisdiction of the trial court. (Petition for Writ of Certiorari, pages 4 & 5.) He merely claims that the trial court in that former case made an unauthorized severance and erred in determining the damages finally and without a jury.

With regard to severance, Rules 40(b), 41 and 174(b), Texas Rules of Civil Procedure, authorize such procedure in Texas. Obvious advantages to the interest of justice through severance in the instant case were to get the severed party out of the remainder of the case, and to enable him to appeal the default prior to trial of the remainder of the case. In *Pierce v. Reynolds*, 329 S.W. 2d 76, the Supreme Court of Texas held that even if severance was erroneous,

it was still effective in the absence of objection, and in any event that such severance was not void and that a complete judgment in a severed cause is final and appealable.

Rule 240, Texas Rules of Civil Procedure (Petition for Writ of Certiorari, p. 5) was no longer applicable after the severance reduced Cause 41754-2-A to a single defendant. Besides, the Rule uses the term "may", and thus is not mandatory.

With regard to the waiver of jury trial, Petitioner did not demand a jury trial, nor object (until he reached the Supreme Court of Texas) to the fact that the trial court heard the evidence without a jury (R. 51-77, 139). Rule 220, Texas Rules of Civil Procedure, was amended in 1947 to read as follows:

> "Rule 220. Withdrawing Cause from Jury Docket.
>
> "When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket *over the objection of the parties adversely interested.* If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit." (Emphasis supplied)

Since no one objected to the withdrawal of the case from the jury docket, the Petitioner was not entitled to a trial by jury under Rule 220 or 243, Texas Rules of Civil Procedure.

Petitioner never raised the jury point in No. 41754-2-A, not even in his two Motions to set aside (R. 151-2, 156-9). Petitioner did not even raise the point in his pleadings in the trial court in the instant case (R. 26-38). Nor did the

Petitioner raise the point in the Court of Civil Appeals (R. 281-335). He therefore waived the jury point repeatedly.

The least that can be said is that the Texas Rules of Civil Procedure afford a reasonable basis for the actions of the trial court in Cause No. 41754-2-A, and such actions were not arbitrary and capricious. Due process was not denied.

As to Cause No. 72080-A, the instant suit in which the judgment was entered below, this was a contested case, and Petitioner has failed to point out any respect in which the trial court violated any due process.

CONCLUSION

Respondent prays that the Application for Writ of Certiorari be denied.

Respectfully submitted,

FRITZ AND VINSON,

By
EDWARD C. FRITZ,
505 North Ervay,
Dallas 1, Texas,
Attorney for Respondent.

CERTIFICATE OF SERVICE

I, EDWARD C. FRITZ, a member of the Bar of the Supreme Court of the United States, do hereby certify that upon the 13th day of February, 1964, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioners by depositing same in the United States Post Office or mail box with postage prepaid addressed to the following counsel of record at his post office address, to-wit:

Mr. Fred S. Abney,
1520 Republic National Bank
Building,
Dallas 1, Texas,
Attorney for Petitioners.

Edward C. Fritz
Edward C. Fritz